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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 978

B. RAY ROBBINS CO., INC., PETITIONER

v.

VALLEY NATIONAL BANK OF ARIZONA

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statement of the Case	3
Reasons for Granting the Writ	6
Conclusion	15
Appendix A—Opinion Below	16
Appendix B—Judgment Below	21
Appendix C—Order Denying Petition for Rehearing	22

TABLE OF CASES

	Page
Appell v. Fiore, 244 F.2d 706, C.A. 5, 1957	7
Atlantic Coast Line R. Co. v. State of Florida, 295 U.S. 301, 55 S.Ct. 713, 79 L.ed 1451	6
Bank of America National Trust & Savings Association v. Merchandise National Bank, 201 F.2d 68, C.A. 9, 1952	10
Bayne V. United States, 93 U.S. 642, 23 L.ed. 997	6
Booth Fisheries Corp. v. Coe, 114 F.2d 462, 72 App. D.C. 195, cert den 311 U.S. 691, 61 S.Ct. 72, 85 L.ed. 447	11
Bull v. United States, 295 U.S. 247, 55 S.Ct. 695, 79 L.ed. 1421, reversing 6 F.Supp. 141, cert granted 294 U.S. 704, 55 S.Ct. 544, 79 L.ed. 1239	6
Cary v. Curtis, 44 U.S. 236, 3 How. 236, 11 L.ed. 576	6

Citie Service Oil Co. v. Adair, 273 F.2d 673, C.A. 10, 1960 ... 11
C.I.R. v. Duberstein, 363 U.S. 278, 80 S.Ct. 1190 ... 12
Copper Belle Min. Co. v. Gleeson, 14 Ariz.548, 134 P. 285 ... 10
Deisch v. Wooten-Agee Co., 95 Ark. 279, 129 S.W. 819 ... 7, 9
Espy v. Bank of Cincinnati, 18 Wall. 604, 21 L.ed 947 ... 6
Firestone Tire and Rubber Co. v. Central National Bank, 159 Ohio St. 423, 112 N.E.2d 636 ... 7, 10
First State Bank & Trust Co. v. First National Bank, 314 Ill. 269, 145 N.E. 382 ... 7, 8
Gulf Oil Corporation v. Lone Star Producing Co., 322 F.2d 28, C.A. 5, 1963 ... 7
Henson v. Lamb, 120 W.Va. 552, 199 S.E. 459 ... 8
Lawrence Warehouse Co. v. Twohig, 224 F.2d 493, C.A. 8, 1955 ... 7, 9
Matarese V. Moore-McCormack Lines, 158 F.2d 631 C.A. 2, 1946 ... 7, 8
McDonald v. Robertson, 104 F.2d 945, C.A. 6, 1939 ... 11
National Bank of California v. Miner, 167 Cal. 532, 140 P. 27 ... 7, 9, 10
Oil Screw Noah's Ark v. Benley & Felton Corp., 332 F.2d 3, C.A. 5, 1963 ... 12
Pullman's Palace-Car Co. v. Central Transporation Co., 171 U.S. 138, 18 S.Ct. 808 ... 6
Smith v. Pacific Mut. Life Ins. Co., 192 F.2d 248 C.A. 6, 1951 ... 11
Squibb & Sons v. Chemical Foundation, Inc., 93 F.2d 475, C.A. 2, 1937 ... 7
Stone v. White, 301 U.S. 532, 57 S.Ct. 851, 81 L.ed. 1265 ... 6
Taylor v. Merrill, 104 F.2d 710, C.A. 9, 1939 ... 10
Thompson v. Sioux Falls National Bank, 150 U.S. 231, 14 S.Ct. 94, 37 L.ed. 1063 ... 6
United States v. American Packing & Provision Co., 122 F.2d 445, cert den 314 U.S. 694, 62 S.Ct. 364, 86 L.ed. 555 ... 7

W. E. Richmond & Co. v. Security National Bank, 16 Tenn. App. 414, 64 S.W.2d 863 ..... 7, 10

Westgate v. Maryland Cas. Co., 147 F.2d 177, C.A. 6, 1945 7, 8

W. R. B. Corporation v. Geer, 313 F.2d 750, C.A. 5, 1963 13

STATUTES

28 U.S. Code Sec. 1254(1) 2

OTHER AUTHORITIES

40 ALR2d 997 7

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled cause on December 9, 1964, denying petitioner's claim to money received by respondent bank from petitioner to purchase time certificates of deposit for customers of petitioner, and used by respondent through mistake on the part of the respondent as security for a loan made to a customer of the said respondent bank.

OPINIONS BELOW

The opinion of the Court of Appeals entered October 29, 1964, is reported in 338 F2d 467. There was no formal opinion of the District Court. Timely petition for rehearing was denied December 9, 1964.

JURISDICTION

This Court's jurisdiction is invoked under 28 U. S. Code Section 1254 (1).

QUESTIONS PRESENTED

1. Whether a party in New York who transmits money through banking channels for the purchase of time certificates of deposit to be issued by receiving bank in Arizona may recover such money shown to have been wrongfully used by the receiving bank as collateral security for loan to bank's customer.

2. Whether a party who has paid money to another through mistake of fact and who does not obtain what was expected in return is entitled to restitution from the other in an action for money had and received.

3. Whether a bank which has received money by mistake and made a loan to it's customer on the unauthorized assumption that said money was collateral for its loan, is liable to repay said money upon receipt of timely notice of the mistake when said bank can recover the money by charging the account of its customer, and reversing bookkeeping entries.

4. Whether the circumstances attending respondent's asserted change of position are such as to render it inequitable to require it to make restitution to petitioner.

5. Whether there was any evidence tending to prove the asserted change of position by respondent bank was detrimental to it; that such change, if any, was material, and finally, that such change, if any, was irrevocable.

6. Whether the recipient of such money paid by mistake may hold on to said money, in an action for money had and received, by simply claiming it had no duty to recognize the payor of such money, notwithstanding timely notice to it whereupon nothing whatever was done, and no effort made to determine the truthfulness of the claim of petitioner.

7. Whether respondent met, by the evidence in the record, the burden imposed upon it under its affirmative defense of change of position to show that it was inequitable to compel respondent to make restitution to petitioner.

8. Whether respondent bank could be placed in statu quo by debiting the account of its customer, the amount of his overdraft claimed to have been paid by proceeds of a loan financed by use of petitioner's money, forwarded to respondent bank for the purchase of time certificates of deposit, and rescinding said loan and seizing or freezing, or otherwise impounding the balance remaining to the account of the bank's customer at the time of receipt of written notice of the claim of respondent, not only tending to demonstrate but actually proving, the payment by petitioner to said respondent bank by mistake.

9. Whether respondent bank may keep petitioners $30,000 by merely claiming it had no duty to investigate the subject matter of petitioner's letter-notice received by the former seven days after receipt of petitioner's money, in the action by petitioner to recover money received by respondent without consideration, and used by respondent for a purpose foreign and contrary to the expressed intention of petitioner.

STATEMENT OF THE CASE

This diversity action was brought by petitioner to recover a $30,000.00 deposit made with respondent bank for one purpose, but used by said bank for a contrary purpose (Complaint).

On August 23, 1960, petitioner deposited $30,000.00 with the Bank of New York for transmittal to respondent in Arizona

(Exhibit 4, p.11, R.57; Exhibit 4B, R.86)[1]. The deposit was made to purchase time certificates of deposit from respondent bank; a letter was written the same day notifying the bank of the deposit and instructing it how the money was to be used (Exhibit 1, R.11, 14).

Petitioner requested respondent bank to issue certificates of deposit to designated payees and return them to petitioner in New York. These certificates were to be issued, "free from all encumbrances of any kind whatsoever and not to be considered as collateral or security for any loan now or hereafter made by the bank," quoting from petitioner's August 23, 1960, letter (Exhibit 1, R.11, 14).

Petitioner wrote respondent bank again on September 1, 1960, concerning the same transaction (Exhibit 2, R.12, 14). Hearing nothing in response to its letters petitioner telephoned respondent on September 12, 1960, inquiring further about the deposit. At this time petitioner was told that the bank employee handling the transaction was sick and no one was on hand who could answer petitioner's questions. The party taking the call at the bank advised petitioner to call later in the week (Exhibit 4, p.17, R.57). Petitioner telephoned respondent on September 16, 1960, only to learn that the bank employee was still sick and had not returned to work, and that no one was available who could give any information concerning petitioner's money (Exhibit 4, p.18, R.57).

Failing in all its attempts to obtain the $30,000.00 or the certificates of deposit, petitioner filed suit in the District Court of Arizona to recover the money deposited for one purpose, but used by respondent bank for a contrary purpose (Complaint).

Respondent bank defended on the grounds it had no agreement with petitioner concerning the deposit, and that prior to receipt of petitioner's letter of instructions respondent had changed its position to its detriment by making a loan to one of its customers, using petitioner's money as collateral (Answer).

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1. Appeal is on "original papers;" references are to Reporter's Transcript.

Within a few months after suit was filed against both respondent and the customer, the cutomer was adjudged a bankrupt, and the cause proceeded to trial against respondent alone (R.4).

On the trial the evidence showed that respondent's customer owed respondent some $68,000.00 in unsecured loans at the time of this transaction, $18,000.00 of which was in the form of an overdraft in his business account (R.50, 52, 65), and that the loan proceeds were used to clear the overdraft and leave a credit balance of $12,000.00 (Exhibit 3, R.65, 66). When respondent received petitioner's letter of August 23, 1960, the status of this account remained the same as it had been immediately after the loan was made: the overdraft had been cleared, and there remained a credit balance of $12,000.00 (Exhibit 3, R.51, 52, 118).

No action was taken by respondent bank upon receipt of petitioner's letter (R.43, 44, 56, 57). No attempt was made to determine the customer's right to use petitioner's money as collateral (R. 106), or to freeze the customer's account to prevent his use of the $12,000.00 remaining therein (Exhibit 3, R. 51, 52). Nothing was done to cancel the loan as made or to reverse the bookkeeping entries so as to debit the customer's account the amount of the overdraft. (Exhibit 3, R.51, 52, 118-121, 127).

Respondent argued at the trial that petitioner's claim to the deposit should be defeated on two grounds: (1) there was no showing of timely delivery of the instructions; and (2) respondent had no duty to recognize petitioner's claim to the money (R. 91).

The District Court denied relief to petitioner and on appeal this decision was affirmed. The Court of Appeals for the Ninth Circuit held that the findings of the trial judge were supported by substantial evidence, were not clearly or at all erroneous, and since respondent bank had changed its position by making the loan to its customer before petitioner's letter reached the bank, it was under no duty to act when the letter arrived.

REASONS FOR GRANTING THE WRIT

I

The decision of the Ninth Circuit is patently and squarely in conflict with this Court's decisions in Espy v. Bank of Cincinnati, 18 Wall. 604, 21 L.ed. 947; and Pullman's Palace-Car Co. v. Central Transporation Co., 171 U. S. 138, 18 S.Ct. 808; and Thompson et al. v. Sioux Falls National Bank, 150 U. S. 231, 14 S.Ct. 94, 37 L.ed. 1063. See also the following cases of this court directly in point, viz: Bull v. United States, 295 U. S. 247, 55 S.Ct. 695, 79 L.ed. 1421, reversing 6 F.Supp. 141, cert granted 294 U. S. 704, 55 S.Ct. 544, 79 L.ed 1239; Atlantic Coast Line R. Co. v. State of Florida, 295 U. S. 301, 55 S.Ct. 713, 79 L.ed. 1451, reversing 11 F.Supp. 36; Bayne v. United States, 93 U. S. 642, 23 L.ed. 997, holding assumpsit will lie whenever the defendant has received money which is the property of the plaintiff and which the defendant is obliged by natural justice and equity to refund; Stone v. White, 301 U. S. 532, 57 S.Ct. 851, 81 L.ed. 1265; Cary v. Curtis, 44 U. S. 236, 3 How. 236, 11 L.ed. 576.

In Espy v. Bank of Cincinnati at 21 L.ed. 949, the Court said: "The principle that money so paid under a mistake of the facts of the case can be recovered back is well settled * * *."

Pullman's Palace-Car Co. v. Central Transporation Co., supra, involved an illegal contract between the parties. The Court awarded judgment in favor of the Central Transporation Company for a reduced amount, and held that courts, while refusing to allow actions upon unlawful contracts, always strive to do justice between parties and permit property or money parted with on the faith of unlawful contracts to be recovered and that in such cases the action is not maintained upon the unlawful contract but upon an implied contract of the defendant to return or make compensation for, the property or money which it had no right to retain.

In the Thompson et al. v. Sioux Falls National Bank case, supra, at page 99, 14 S. Ct. Reporter, this Court said:

"While it is true the plaintiff bank credited the bondsmen with the amount of the check on its receipt, it parted with nothing upon the faith of it until nearly a week thereafter. If it had cancelled the check on the evening of the 13th, as it was requested to do, it would have done no more than the law required of it. The mere credit of a check upon the books of a bank, which may be cancelled at anytime, does not make the bank a bona fide purchaser for value. If after such credit, and before payment for value upon the faith thereof, the holder receives notice of the invalidity of the check, he cannot become a bona fide holder by subsequent payment." citing Dresser v. Construction Co., 93 U. S. 92; and state court cases.

In the case at bar respondent has the duty to pay back petitioner's money on the basis of an implied contract to return that which it had no right to use in the first place, and now has no right to retain.

II

The decision of the Court of Appeals for the Ninth Circuit is in conflict with decisions of the Second Circuit in Matarese v. Moore-McCormack Lines, 158 F.2d 631, and Squibb & Sons v. Chemical Foundation, Inc., 93 F.2d 475; the Fifth Circuit in Appell v. Fiore, 244 F.2d 706, and Gulf Oil Corporation v. Lone Star Producing Co., 322 F.2d 28; the Sixth Circuit in Westgate v. Maryland Cas. Co., 147 F.2d 177; the Eighth Circuit in Lawrence Warehouse Co. v. Twohig, 224 F.2d. 493; the Tenth Circuit in United States v. American Packing & Provision Co., 122 F.2d 445, cert den, 314 U. S. 694, 62 S.Ct. 364, 86 L.ed 555.

This decision is also in conflict with the following state court cases: Deisch v. Wooten-Agee Co., 95 Ark. 279, 129 S.W. 819; National Bank v. Miner, 167 Cal. 532, 140 P. 27; Firestone Tire and Rubber Co. v. Central National Bank, 159 Ohio St. 423, 112 N.E.2d 636; and W. E. Richmond & Co. v. Security National Bank, 16 Tenn. App. 414, 64 S.W.2d 863, collected in the Annotation in 40 ALR2d 997; and First State Bank & Trust Co. v.

First National Bank, 314 Ill. 269, 145 N.E. 382; Henson v. Lamb, 120 W.Va. 552, 199 S.E. 459.

In each of the cited cases, the courts dealt with factual situations analogous to petitioner's case.

In Matarese v. Moore-McCormack Lines, supra, 158 F.2d 631, the Second Circuit declared that the doctrine of unjust enrichment or recovery in quasi-contract obviously does not deal with situations in which the party to be charged has by word or deed legally consented to assume a duty toward the party seeking to charge him, and said:

> "Instead, it applies to situations where as a matter of fact there is no legal contract, but where the person sought to be charged is in possession of money or property which in good conscience and justice he should not retain, but should deliver to another,"

citing cases, and holding that:

> "Where this is true the courts impose a duty to refund the money or the use value of the property to the person to whom in good conscience it ought to belong." (citing Restatement, Restitution, Sec. 1(a); and Pullman's Palace-Car Co. v. Central Transporation Co., 171 U. S. 138, 152, 18 S.Ct.808, 43 L.ed. 108).

All of the cited cases squarely hold that money paid under a mistake of fact can be recovered. The right to recover in these cases is based upon equitable principles; the plaintiff is merely required to show that money was obtained under such circumstances as in equity and good conscience it should be returned.

The Sixth Circuit in Westgate v. Maryland Casualty Co., supra, 147 F.2d 177, 180, said:

> "Unjust enrichment as a cause of action falls under indebitatus assumpsit. It is grounded on the equitable principle that one who has been unjustly enriched at the expense of another is required to make restitution."

Lawrence Warehouse Company v. Twohig, supra, 224 F.2d 493, 498, was an action for restitution. Here the Eighth Circuit said:

> "The term 'benefit', for purposes of restitution, denotes any form of advantage received, which is capable of having its value measured, and it accordingly includes the advantage of being saved from an expense or loss. Restatment, Restitution, Sec. 1, Comment b. Any benefit received by one person as against another is entitled to be regarded as an unjust enrichment, 'if the circumstances of its receipt or retention are such that as between the two persons, it is unjust for him to retain it' * * *."

In National Bank of California v. Miner, 167 Cal. 532, 140 P. 27, the bank argued it had changed its position and parted with value when it credited its customer's account with the deposit of a cashier's check obtained as a result of a mistake on the part of another bank. The court pierced this argument in the following manner:

> "(A)11 that (the bank) did, after the receipt of the check and within the hour before its notification of the mistake, was to credit the amount of the check upon the overdue note of (its customer) which it held.
>
> * * *
>
> It was the mere bookkeeper's stroke of the pen whereby (the customer's) commercial account was lessened by the transfer of a credit upon his promissory note. * * * The entries which it thus made were all subject to its control and could be changed without injury or detriment to it to comport and comply with the truth."

The court concluded that the bank parted with no value and changed its position only by a stroke of the pen, which another stroke could restore (citing Thompson v. Sioux Falls National Bank, 150 U. S. 231, 14S Ct. 94, 37 L.ed. 1063, and other cases).

Desich v. Wooten-Agee Co., 95 Ark. 279, 129 S.W. 819, was an

action to recover a payment made in error. The court held that crediting the payment on an account of the payee was not a prejudicial change of position:

> "It is only when the payee has changed his position to his prejudice because thereof and cannot be put in statu quo by the payor that money paid under a mistake of fact cannot be recovered."

To the same effect see W. E. Richmond & Co. v. Security National Bank of Jackson, 16 Tenn. App. 414, 64 S.W.2d 863; and Firestone Tire & Rubber Co. v. Central National Bank, 159 Ohio St. 423, 112 N.E.2d 636.

In Bank of America National Trust & Savings Assn. v. Merchandise National Bank, 201 F.2d. 58, C.A. 9, 1952, where defendant bank allowed its depositor to overdraw his account, it later received from plaintiff an advice of credit with respect to checks collected for depositor, credited the account and reduced the overdraft, the bank's bookkeeping entries, while constituting a change of position, were held not a change to the detriment of the defendant. The Court cited in support of this proposition National Bank of California v. Miner, 167 Cal. 532, 140 P. 27, supra.

III

The judgment of the Court of Appeals is at variance with, and contrary to, Arizona law, as announced in Taylor v. Merrill, 104 F.2d 710, C.A. 9, 1939, cert den 308 U.S. 593, 60 S.Ct. 122, 84 L.ed. 496; and Copper Belle Min. Co. v. Gleeson, 14 Ariz. 548, 134 P. 285.

In Copper Belle Min. Co. v. Gleeson, supra, the Arizona Supreme Court said:

> "Assumpsit for money had and received is of an equitable character, and it may in general be maintained by any legal evidence showing that the defendant has received or obtained possession of money of the plaintiff which in equity and good conscience he ought to pay over to the plaintiff (citing cases)."

To reconcile the opinion of the Ninth Circuit in the instant case against petitioner, it is necessary to read into the record evidence of change of position to the detriment of respondent, contrary to the indisputable and uncontradicted facts of the case.

The uncontradicted evidence shows respondent had knowledge of facts which placed it in a position where it was enabled to enrich itself unjustly at the expense of petitioner. Possessed of both notice and knowledge, respondent chose to do nothing. Respondent is charged before this Court with knowledge of all it could have discovered as a result of notice from petitioner, including the fact that Robbins' $30,000.00 was not intended to collateralize its customer's note but was to purchase time certificates of deposit to be returned to petitioner in New York. On the question of notice, the decision of the Ninth Circuit is contrary to the following cases: Booth Fisheries Corp. v. Coe, 114 F.2d 462, 72 App. D. C. 195, cer den 311 U. S. 691, 61 S.Ct. 72, 5 L.ed. 447; Cities Service Oil Co. v. Adair, 273 F.2d 673, C.A. 10, 1960; Smith v. Pacific Mut. Life Ins. Co., 192 F.2d 248, C.A. 6, 1951; McDonald v. Robertson, 104 F.2d 945, C.A. 6, 1939.

IV

The District Court made no finding concerning the failure of respondent to investigate the subject-matter of the letter-notice of August 23, 1960, that respondent ignored repeated telephone calls from petitioner to inquire about its money and the requested certificates of deposits. Petitioner proved the transmittal of the money and receipt by respondent. It proved the purpose and intended use of such money. Without findings concerning these matters the effect and duty of respondent bank to investigate the matter, and the "actual knowledge" with which such bank is charged under the law by this timely "notice" the judgment of the Court of Appeals is not put upon a basis adequate to support it.

Likewise the District Court ignored, and made no finding on the effect of respondent bank's use of the money to discharge its customer's overdraft at respondent bank, and the effect, if any, such bookkeeping entry had on the right of petitioner to re-

cover all, or at least part, of its money. No finding was made on the obligation and duty imposed on respondent bank to "freeze" and otherwise seize and impound, and prevent the use of, the balance remaining in the customer's account at the time and on the date respondent had, and is charged with, "actual" knowledge of the true facts of petitioner's case, that it forwarded $30,000.00 to respondent to purchase certificates of deposit.

With these suggested additional findings, unquestionably sustained by the uncontradicted evidence in the record, as for example the letter-notice of August 23, 1960, the follow-up letter of September 1, 1960, and the telephone calls to respondent bank by petitioner, the conclusions of law necessarily to follow would strongly argue for, if not dictate, a judgment in favor of petitioner Robbins. At least, in the exercise of its supervisory jurisdiction this Court should remand this cause for further findings.

As said by this Court, in C. I. R. v. Duberstein, 363 U. S. 278,80 S.Ct. 1190, 1199, 1200 (1960) on page 1200, 80 S.Ct. Rep.,

> "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.' United States v. United States Gypsum Co., 333 U. S. 364, 395, 68 S.Ct. 525, 542, 92 L.ed. 746 * * * ."

The opinion of the Ninth Circuit obviously overlooks these matters, and its holding "that the findings of fact of the district court are supported by substantial evidence and are not clearly or at all erroneous and that the court's conclusions of law therefrom are proper," is without support in the record, and is contrary to the overwhelming weight of the evidence, and the indisputable character of the evidence.

Adopting the language of Circuit Judge John R. Brown, of the Fifth Circuit, in Oil Screw Noah's Ark v. Bentley & Felton Corp., 322 F.2d 3 (1963), at pages 5 and 6, we urge upon the Court the position that in this cause "(t)here is still the quali-

tative factor of the truth and right of the case, the impression that a fundamentally wrong result has been reached," and refer to W. R. B. Corporation v. Geer, 313 F.2d 750, 753 (1963), where the same scholarly judge again dealt with a similar problem, i.e., the right and duty of courts of appeal of the United States to review findings of district courts, and said:

> "In view of this we cannot indulge any assumption that the Judge was using 'substantial evidence' as the equivalent of 'clearly erroneous.' To pass that test the evidence must, of course, be substantial. But unlike the Judge's function in passing on the sufficiency of the evidence in a jury case, it does not end there. As does the appellate Court in reviewing like findings of a District Court, the clearly erroneous concept of F.R. Civ. P. 52 (a) requires findings to be set aside if the Court is left with the impression that the result is not the truth and right of the case. In this sense, at least, the two terms are not synonymous, and the Judge had the obligation to determine that this record and the attacked findings satisfied that meaning as well. 2B Barron & Holtzoff, Federal Practice & Procedure Sec. 1135 (Wright ed. 1961) citing this Court's decision in Sanders v. Leech, 5 Cir., 1946, 158 F.2d 486; United States v. Kaplan, 5 Cir. 1960, 277 F.2d 405; Manufacturer's Cas. Ins. Co. v. Instrusion-Prepakt, Inc., 5 Cir., 1959, 264 F.2d 758; Slattery Co. v. United States, 5 Cir., 1956, 231 F.2d 37; Western Cottonoil Co. v. Hodges, 5 Cir., 1955, 218 F.2d 158."

The Fifth Circuit, in W. R. B. Corporation v. Geer, supra, at p. 753, went on to say that essential as is the Court's dependence on counsel to pinpoint

> "both the specific issues under attack and the relevant portions of the record demonstrating the asserted presence or absence of evidence, * * * it cannot escape the judicial travail incident to the objections by putting the burden on counsel alone."

In the quoted case, the Court vacated the judgments appealed from, and remanded the causes.

In the instant case, Counsel for petitioner is bold to assert he believes petitioner is entitled to have the court grant certiorari, docket the case, and after argument and hearing, render judgment in favor of petitioner. But surely he has shown entitlement to further findings and conclusions of law, and then to judgment according to the law and the evidence.

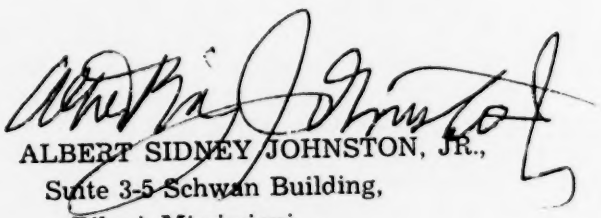
V

The questions presented are of vital concern to the Banking trade, and business generally. If permitted to stand. the decision of the Ninth Circuit against petitioner could have a far-reaching effect on business by mail, and could mean the end of large and important transactions unless the parties sit across table and deal with each other face to face. One could never know when a receiving bank would credit moneys transmitted by mail, and pursuant to instructions via mail, to another's account and use the sender's money to wipe out "overdrafts," and, by failing to respond to repeated requests for information concerning the sender's money place such funds as collateral for loans to a receiving bank's impoverished and needy customers, especially those already indebted to said banks. Opportunities for gross wrong-doing could easily be multiplied.

CONCLUSION

To give lasting and permanent effect to this Court's decisions and resolve the conflict between the decision of the Ninth Circuit and contrary decisions of the Second, Fifth, Sixth, Eighth and Tenth Circuits; and the state Supreme Court cases cited herein, the petition for a writ of certiorari should be granted.

Respectfully submitted.



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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

B. RAY ROBBINS CO., Appellant,
vs.
VALLEY NATIONAL BANK OF ARIZONA, Appellee.
No. 19,195

(October 29, 1964)

On Appeal from the United States District Court for the District of Arizona

Before: HAMLIN, JERTBERG and DUNIWAY, Circuit Judges.

HAMLIN, Circuit Judge

B. Ray Robbins Co., a New York corporation, appellant herein, filed an action in the United States District Court for the District of Arizona against Valley National Bank of Arizona, a national banking association, appellee herein, and Anthony Vaccaro, seeking to recover the sum of $30,000. After the filing of said action Vaccaro was adjudicated a bankrupt and the action was stayed as to him.

After a trial to the court, a jury having been duly waived, the district court rendered a judgment in favor of appellee. A timely appeal was taken to this court which has jurisdiction by reason of 28 U.S.C. Sec.1291 et seq.

The facts show that Anthony Vaccaro was indebted to appellee by reason of certain loans theretofore made to him by appellee. He was seeking a further loan from appellee and was informed by appellee that such loan would not be granted unless such further loan was secured. It appears that Vaccaro then talked by telephone to one McCabe in New York concerning a method of raising money. McCabe mentioned a time de-

posit. Vaccaro told McCabe to talk to Nesbitt, a vice president of appellee, and that he (Vaccaro) would do what Nesbitt told him. On August 10, 1960, Nesbitt wired McCabe as follows:

"We will accept a time deposit in the amount of $30,000 for a term of one year bearing interest at 3% per annum pledged as security on a loan in like amount for Anthony Vaccaro.

H. W. NESBITT
Vice President
Valley National Bank"

It appears further that thereafter McCabe talked with appellant in New York concerning the transaction. Thereafter on August 23, 1960, appellant without contacting Vaccaro or appellee delivered a certified check in the sum of $30,000 to the Bank of New York in New York, with which bank appellee had an account. On the same day the Bank of New York wired appellee that it was crediting appellee in its bank with $30,000 by order of Anthony Vaccaro.

On receipt of this wire appellee contacted Vaccaro, granted him a $30,000 loan, isued a $30,000 certificate of deposit in his name which Vaccaro endorsed in blank and returned it to appellee as security for the loan. On Vaccaro's signing a note for $30,000 this sum was deposited in Vaccaro's account which prior to that time had been overdrawn in the sum of approximately $17,000. This transaction was completed between appellee and Vaccaro not later than August 24, 1960. About a week later, on August 30, 1960, appellee received a letter from appellant dated August 23, 1960, addressed to Mr. Nesbitt, which stated that it that day had delivered to the Bank of New York a certified check in the sum of $30,000 to be deposited to appellee's account and that

"Negotiable Certificates of Deposit, paying 3% per annum maturing in twelve months, are to be issued, free from all encumbrances of any kind whatsoever and not to be considered as collateral or security for any loan now or hereafter made by the bank, in the names of the following:

Principal Investing Corp.	$ 5,000
Inez Russo	10,000
Floyd B. Gregory or Letha M. Gregory	5,000
Gold Pure Food Products Co., Inc.	10,000

Please mail all Certificates to us."

This was the first contact between appellant and appellee. At the time of the receipt of this letter by appellee the transaction between Vaccaro and appellee had been completed, and at the time of the completion of the transaction appellee had no knowledge of appellant or of its interest or participation in the transaction. Also as of August 23, 1960, neither appellee nor Vaccaro had requested appellant to furnish a compensating balance.

Appellant has advanced several theories to support his claim, none of which is supported by the evidence or by the court's findings.

In the complaint appellant alleged that it "was requested to make and did so make a compensating balance deposit with" appellee. If this was intended to allege that appellee made such a request, there is no evidence in the record to support such a claim. In the trial court appellant then argued that McCabe was appellee's agent and that he made a material misrepresentation to appellant to induce appellant's action. Appellant has pointed to no evidence in the record which would show that McCabe was appellee's agent. The district court found that McCabe was "acting on behalf of someone other than defendant Bank" (appellee). The evidence supports this finding.

On appeal appellant argues that it can recover under Restatement, Restitution Sec. 28(c) (1936) on the ground that the mistake was induced by material representation of McCabe who purported to be an agent of appellee. Section 28 reads as follows:

"A person who has paid money to another because of a mistake of fact and who does not obtain what he expected in return is entitled to restitution from the other if the mistake is induced: (a) by the fault of the payee, or (b) by his innocent and material misrepresentation, or (c) by the fraud or mate-

rial misrepresentation of a person purporting to act as the payee's agent, or (d) by the fraud or material misrepresentation of a third person, provided that the payee has notice of the fraud or representation before he has given or promised something of value."

The record does not show that McCabe ever purported to be acting for appellee. Section 28 (c) therefore cannot apply. Section 28(d) also is completely inapplicable because appellee made a loan to Vaccaro before it received notice of any claimed mistake.

Among other findings made by the district court were the following:

"14. That at no time material to the issues of this case was there an agreement between plaintiff and defendant Bank that said Thirty Thousand and no/100 Dollars ($30,000.00) should be used as a compensating balance by defendant Bank, and certificates of deposit issued by defendant Bank in accordance with plaintiff's instructions.

"15. That defendant Bank was not at any time material to the issue of this case acting under a mistake as to its understanding with the defendant Vaccaro."

From its findings of fact the district court made certain conclusions of law which are set out in the margin.[1]

We hold that the findings of fact of the district court are supported by substantial evidence and are not clearly or at all erroneous and that the court's conclusions of law therefrom are proper.

Judgment affirmed.

---

[1]CONCLUSIONS OF LAW

1. That plaintiff was acting under a mistake as to the terms and conditions of the understanding between the defendant Vaccaro and the defendant Bank; that defendant Bank was not acting under any mistake; that the defendant Bank made no misrepresentation regarding this transaction to any one concerned with this transaction; that there was no ambiguity in the terms of the understanding between the defendant Bank and defendant Vaccaro; that the defendant Bank had no

notice prior to acting that the plaintiff had made a mistake; that the defendant Bank acted in good faith.

* * *

4. That the defendant Bank was under no duty to rescind the transaction at the time it received plaintiff's letter of instructions dated August 23, 1960 (Plaintiff's Exhibit 1); nor was defendant Bank under a duty to seize the money remaining in defendant Vaccaro's checking account at the time it received said letter.

5. That the defendant Bank has materially changed its position in good faith and in reliance upon the advice of credit received from said Bank of New York; and that the defendant Bank cannot be restored to its original position.

6. That at no time material to the issues of this case was there any contract, agreement or understanding between plaintiff and defendant Bank concerning the disposition or use of the said Thirty Thousand and no/100 Dollars ($30,000.00).

7. That the said Bank of New York was not acting as the agent of the defendant Bank at any time material to the issues of this case.

8. That the said McCabe was not acting as the agent of the defendant Bank at any time material to the issues of this case.

APPENDIX B

Judgment

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

R. RAY ROBBINS CO., Appellant vs. VALLEY NATIONAL BANK OF ARIZONA, Appellee	No. 19,195

APPEAL from the United States District Court for the District of Arizona.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Arizona, and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court be, and hereby is affirmed.
Filed and entered October 29, 1964.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Wednesday, December 9, 1964.
Before: HAMLIN, JERTBERG AND DUNIWAY, Circuit Judges.

ORDER DENYING PETITION FOR REHEARING

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of appellants filed November 27, 1964, and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied.

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In the Supreme Court of the United States

OCTOBER TERM 1964

No. 978

R. RAY ROBBINS CO., INC.,
Petitioner,
vs.
VALLEY NATIONAL BANK OF ARIZONA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Respondent's Brief in Opposition

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TABLE OF CONTENTS

	Page
Question Presented	1
Statement of Case	2
1. Theories of Respective Parties	2
2. The Facts of This Case	3
Argument	5
I. The petition presents no federal question nor raises an issue of constitional import	5
II. The decision of the Ninth Circuit Court of Appeals is not in conflict with the decisions of the Supreme Court of the United States, the Court of Appeals in the other circuits, nor is it in conflict with the majority of decisions in the States	6
Summary	10
Conclusion	11

TABLE OF CASES AND AUTHORITIES

	Pages
Associates Discount Corporation v. Clements, 321 P.2d 673 (Okla. 1958)	8
Ball v. Shepard, 202 N.Y. 247, 95 N.E. 719 (1911)	7
B. Ray Robbins Co. v. Valley National Bank of Arizona, 338 F.2d 467 (Ninth Cir. 1964)	5
Copper Belle Min. Co. v. Gleeson, 14 Ariz. 548, 134 Pac. 285 (1913)	10
Fidelity Mutual Life Insurance Co. v. Clark, 203 U.S. 64, 51 L.Ed. 91, 27 S. Ct. 19 (1906)	8
Hatch v. Fourth Natl. Bank, 147 N.Y. 184, 41 N.E. 403 (1895)	8, 9
Hullett v. Cadick Milling Co., 90 Ind. App. 271, 168 N.E. 610 (1929)	8
Jefferson County Bank v. Hansen Lumber Co., 246 Ky. 384, 55 S.W. 2d 54 (1932)	8
Knapp v. First Natl. Bank & Trust Co., 154 F.2d 395, (Tenth Cir. 1946)	7
Lake Gogebic Lumber Co. v. Burns, 331 Mich. 315, 49 N.W. 2d 310 (1951)	8, 9
Spaulding v. Kendrick, 172 Mass. 71, 51 N.E. 453 (1898)	8
United States v. E. I. DuPont DeNemours & Co., 351 U.S. 377, 76 S. Ct. 994 (1956)	5
United States v. Hadden, 192 F.2d 327 (Sixth Cir. 1951)	7, 8
United States v. National Ass'n. of Real Estate Bds., 339 U.S. 485, 70 S. Ct. 711 (1950)	6
United States v. United States Gypsum Co., 333 U.S. 364, 68 S. Ct. 525 (1948)	6
United States v. Yellow Cab Co., 338 U.S. 338, 70 S. Ct. 177 (1949)	6

Pages

Weiner v. Roof, 19 Cal. 2d 748, 122 P.2d 896 (1942) 8
Winslow v. Anderson, 78 N.H. 478, 102 Atl. 310 (1917) 8

RULES

Rule 19, Supreme Court of the United States Revised Rules.... 6

OTHER AUTHORITIES

114 A.L.R. 382, Anno. 7, 8
49 Am. Jur., *Payments* § 204, p. 855 ..... 7, 9

In the Supreme Court of the United States

OCTOBER TERM 1964

No. 978

B. RAY ROBBINS CO., INC.,
Petitioner,

vs.

VALLEY NATIONAL BANK OF ARIZONA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

Respondent's Brief in Opposition

Respondent, for the sake of brevity, adopts the sections of the Petition for Writ of Certiorari entitled OPINIONS BELOW and JURISDICTION. However, respondent does not believe that the remainder of the petition fairly presents the case. For that reason, respondent submits this brief in opposition to the petition for a writ of certiorari.

QUESTION PRESENTED

May the petitioner, who has delivered money to the payee through a mistake on the part of the petitioner, recover this money from a bank which has received this money from the payee in good faith, in the normal course of business

and without knowledge of the mistake of the petitioner and as security for a debt owed it by the payee?

STATEMENT OF THE CASE

1. Theories of Respective Parties

In its Complaint, seeking recovery of Thirty Thousand Dollars ($30,000.00) from Anthony Vaccaro and the Valley National Bank of Arizona, B. Ray Robbins Co. alleged that it was requested to make a compensating balance with the Bank for the benefit of Vaccaro, and that after Robbins made this deposit, the Bank, acting through a mistake (R.T. 88), used the funds as collateral security for a loan to Vaccaro contrary to the specific instruction of Robbins.

The Bank answered by stating that it did not request Robbins to make a compensating balance with it, and that there was never an agreement between the Bank and Robbins as to how this money was to be used. As to the allegation of mistake, the Bank claimed that it was not acting under any mistake concerning the transaction; and if there was a mistake, it was solely the mistake of Robbins or others for which the Bank was not responsible, and also that the Bank had materially changed its position by making a loan to Vaccaro.

Several other theories have also been advanced by Robbins, both during the trial and on the appeal. Robbins argued to the Ninth Circuit that one McCabe was the agent of the Bank and that his acts and statements bound the Bank; that the Bank of New York was the agent of the Bank and, therefore, its mistake in forwarding the funds was the mistake of the Bank; that Robbins' funds were a special deposit and therefore, it is entitled to recover this deposit when the Bank breached the contract creating the special deposit; and finally, that the Bank ratified the

actions of McCabe and the Bank of New York and, therefore, was bound by the acts of these persons. As stated by the Ninth Circuit, these theories are not supported by the evidence nor by the findings.

2. The Facts of This Case

In April, 1960, Vacarro needed money (R.T. 95). He approached Howard Nesbitt of the Valley National Bank in an attempt to obtain a loan (R.T. 96). Nesbitt informed Vaccaro that the Bank would grant the loan only if it were secured (R.T. 96-97).

Vaccaro then sought other methods of raising money. Prior to August 10, 1960 (R.T. 101), a Mr. McCabe of McCabe & Associates, a New York firm, called Vaccaro regarding a loan and mentioned a time deposit (R.T. 100). Vaccaro, not understanding the terminology of the financial world, told Mr. McCabe to talk to Nesbitt, and that Vaccaro would do what Nesbitt told him (R.T. 100). At the conclusion of this call, Vaccaro informed Nesbitt of McCabe's call (R.T. 101).

On August 10, 1960, Nesbitt wired McCabe stating that the Bank would accept a time deposit in the amount of Thirty Thousand Dollars ($30,000.00), *pledged as security* on a loan of Thirty Thousand Dollars ($30,000.00) to Vaccaro (Pl. Ex. 4-a, R.T. 86, R.T. 117).

Sometime after August 10, 1960, McCabe talked with Robbins concerning this transaction (Pl. Ex. 4, p. 7, R.T. 58). This was the first contact Robbins had with this transaction (Pl. Ex. 4, p. 11, R.T. 58). Robbins also contacted the Bank of New York prior to August 23, 1960, to determine whether or not it could transfer funds to the Bank. This was the first contact regarding this transaction had by the Bank of New York (Def. Ex. H, p. 2, 3, R.T. 139, 143). As a result of its conversations with McCabe, Robbins

proceeded to act. It did not contact Vaccaro (Pl. Ex. 4, p. 22, R.T. 58) nor did it contact the Bank (Pl. Ex. 4, p. 11, 23, R.T. 58, Request for Admission of Fact) prior to taking action, but acted solely on its conversations with McCabe. On August 23, 1960, Robbins delivered a certified check in the amount of Thirty Thousand Dollars ($30,000.00) and a letter of transmittal to the Bank of New York, (Pl. Ex. 4-b, R.T. 86; Def. Ex. J, p. 27, 29, R.T. 143). The Bank of New York advised the Bank by teletype that the Bank of New York was crediting it the sum of Thirty Thousand Dollars ($30,000.00) "by order of Anthony Vaccaro" (Def. Ex. J, p. 25, R.T. 143; Def. Ex. F, R.T. 129, 132).

On August 24, 1960, Vaccaro went to the Bank (R.T. 102; Stipulation, R.T. 138), where he signed a promissory note in the sum of Thirty Thousand Dollars ($30,000.00) (Def. Ex. C, R.T. 103, 105); endorsed in blank a certificate of deposit in the amount of Thirty Thousand Dollars ($30,000.00) (Def. Ex. B, R.T. 103, 105); and executed a general pledge agreement (Def. Ex. E, R.T. 103, 105) at which time Thirty Thousand Dollars ($30,000.00) was deposited to Vaccaro's account, curing an overdraft of approximately Seventeen Thousand Dollars ($17,000.00). (Def. Ex. D, R.T. 103, 105; Ex. 5-A, p. 10, R.T. 67; R.T. 102).

At this point, the transaction between Vaccaro and the Bank had been completed in accordance with their agreement (R.T. 96-97) and in accordance with Nesbitt's telegram to McCabe (Pl. Ex. 4-a), and in reliance upon the advice of credit received from the Bank of New York (Pl. Ex. 4-c). As of this date, the Bank did not have any knowledge of Robbins nor of its interest or participation in this transaction. As of August 23, 1960, neither the Bank nor Vaccaro requested Robbins to furnish a compensating balance (Pl. Ex. 4, p. 22, 23).

One week after the transaction had been completed (R.T. 118-120), Nesbitt received a letter from Robbins which contained instructions as to whom certain certificates of deposit should be made payable (Pl. Ex. 1, R.T. 11, 14). This was the *first* contact between Robbins and the Bank (Pl. Ex. 4, p. 11).

ARGUMENT

I. The petition presents no federal question nor raises an issue of constitutional import.

The petition for a writ of certiorari does not present a federal question nor does it raise any constitutional questions. Stripped to its essentials, the petition challenges the findings of fact that were adopted by the District Court, and upon review by the Ninth Circuit, were found to be "supported by substantial evidence and . . . not clearly or at all erroneous. . . ."[1]

This Court has clearly announced its position in cases of this kind. It has stated that:

> "For the (plaintiff) to succeed in this Court now, it must show that erroneous legal tests were applied to essential findings of fact or that the findings themselves were 'clearly erroneous' within our rulings on Rule 52(a) of the Rules of Civil Procedure, 28 U.S.C.A. (citing cases). We do not try the facts of cases *de novo*."[2]

Robbins has utterly failed to comply with this statement. There is no place in the petition where Robbins shows that the findings of fact are "clearly erroneous." All the petition does is state that the facts of the case should be

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1. *B. Ray Robbins Co. v. Valley National Bank of Arizona*, 338 F.2d 467, 470 (Ninth Cir. 1964).

2. *United States v. E. I. DuPont DeNemours & Co.*, 351 U.S. 377, 381; 76 S.Ct. 994 (1956).

construed in favor of Robbins. In such cases, this Court has stated:

> "While, of course, it would be our duty to correct clear error, even in findings of fact, the (plaintiff) has failed to establish any greater grievance here than it might have in any case where the evidence would support a conclusion either way but where the trial court has decided it to weigh more heavily for the defendants. Such a choice between two permissible views of the weight of evidence is not 'clearly erroneous.'"[3]

The petition does not present a case of "clear error." It does not present a case creating a "definite and firm conviction that a mistake has been committed."[4] It does not present "an important question of federal law." It does not present a constitutional question. And it does not present a case where the courts have "departed from the accepted and usual course of judicial proceedings."[5] Therefore, this petition should be denied.

II. The decision of the Ninth Circuit Court of Appeals is not in conflict with the decisions of the Supreme Court of the United States, the Court of Appeals in the other circuits, nor is it in conflict with the majority of decisions in the States.

In its petition for a writ of certiorari, Robbins alleges that the decision of the Ninth Circuit Court of Appeals is in conflict with not only decisions of this Court, but also decisions in the other circuits and of various state court opinions. In an effort to substantiate this allegation,

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3. *United States v. Yellow Cab Co.*, 338 U.S. 338, 342, 70 S.Ct. 177 (1949). See also: *United States v. National Ass'n of Real Estate Bds.*, 339 U.S. 485, 495, 70 S.Ct. 711 (1950).

4. *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525 (1948).

5. Rule 19, Supreme Court of the United States Revised Rules.

the petition cites a great number of cases, all of which purport to hold that whenever a defendant has received money which is the property of a plaintiff, and the defendant has no proper claim to the money, then in equity and good conscience, the defendant will be required to repay the money to the plaintiff.

With that general rule of law the Bank has no quarrel. However, the facts of this case do not fit the application of that rule. The petition does not point out how this rule is applicable to the facts before the Court. Indeed, it cannot, because a close analysis of the cases relied upon by Robbins shows that the mistake of fact or law in each case arose directly between the parties to the lawsuit. In such fact situations, clearly the payor is entitled to restitution if the payee knew of the payor's mistake before receipt of the money, or if after the receipt of the same, the payee had not changed its position prior to learning of the mistake.

But in cases where the mistake of the payor is induced by a third party, and the payee is unaware of the mistake and receives the money in the regular course of business in good faith and for a valuable consideration, a different rule applies.[6] This rule is that where, as a result of a mistake of the payor, money is paid on account of another to a third party, who receives the same in good faith, in the normal course of business and without knowledge of the mistake and applies the same to a debt of the other, the payor cannot recover the money from the third person. *United States v. Hadden*, 192 F.2d 327 (Sixth Cir. 1951); *Knapp v. First Nat. Bank & Trust Co.*, 154 F.2d 395 (Tenth Cir. 1946); 40 Am. Jur., *Payment*, § 204, p. 855.

This rule has been applied in various situations. *Anno.*,

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6. See *Ball v. Shepard*, 202 N.Y. 247, 95 N.E. 719 (1911) for a good discussion of the distinction between the two rules.

114 A.L.R. 382. It has been applied where the funds were gained by the payee through mistake,[7] fraud and/or misrepresentation,[8] and in cases where banks have received the sums either directly from the payor,[9] or from the third party,[10] and have deposited them to the account of the third party, thus curing overdrafts or using them as security for other loans.

The reason for the rule is this:

> ". . . to permit, in every case of the payment of a debt, an inquiry as to the source from which the debtor derived the money, and a recovery if shown to have been dishonestly acquired, would disorganize all business operations, and entail an amount of risk and uncertainty which no enterprise could bear." *Hatch v. Fourth Natl. Bank*, 147 N.Y. 184, 41 N.E. 403 at 404. "As between the payor and the payee there is no mistake which affects the validity of the transaction. *One receiving money* or negotiable securities in payment of, or *as security for, an existing debt*, is not bound to inquire where the money or securities were obtained. It is better that money or a negotiable security passing from hand to hand, to one who rightly receives it for a valuable consideration, should carry on its face its own credentials." (Emphasis supplied). *Spaulding v. Kendrick*, 172 Mass. 71, 51 N.E. 453 at 454.

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7. *Lake Gogebic Lumber Co. v. Burns*, 331 Mich. 315, 49 N.W. 2d 310 (1951); *Winslow v. Anderson*, 78 N.H. 478, 102 Atl. 310 (1917); *United States v. Hadden*, 192 F.2d 327 (Sixth Cir. 1951).

8. *Fidelity Mutual Life Insurance Co. v. Clark*, 203 U.S. 64, 51 L.Ed. 91, 27 S.Ct. 19 (1906); *Spaulding v. Kendrick*, 172 Mass. 71, 51 N.E. 453 (1898); *Associates Discount Corporation v. Clements*, 321 P.2d 673 (Okla. 1958).

9. *Weiner v. Roof*, 19 Cal.2d. 748, 122 P.2d 896 (1942); *Jefferson County Bank v. Hansen Lumber Co.*, 246 Ky. 384, 55 S.W.2d 54 (1932); *Hullett v. Cadick Milling Co.*, 90 Ind. App. 271, 168 N.E. 610 (1929).

10. *Spaulding v. Kendrick*, 172 Mass. 71, 51 N.E. 453 (1898); *Hatch v. Fourth Natl. Bank*, 147 N.Y. 184, 41 N.E. 403 (1895).

In this case, Robbins, when it gave the funds to the Bank of New York for transmittal to Arizona, stated that these funds were requested by Vaccaro (Pl. Ex. 4-b). These funds were paid directly to the order of Vaccaro (Pl. Ex. 4-c). The Bank had no access to these funds at this time, other than to hold them until Vaccaro disposed of them as he saw fit. Vaccaro then went to the Bank, accepted these funds (Def. Ex. B) and offered this money to the Bank as security for a loan of a like amount. In accordance with its prior agreement with Vaccaro (R.T. 96-97; Pl. Ex. 4-a), the Bank entered into the loan. When Vaccaro received the proceeds of this loan, he deposited it to his account, thus curing an overdraft.

At this point in time, the Bank had no knowledge as to the existence of Robbins or its interest, if any, in this transaction. There was nothing on the advice of credit sent by the Bank of New York to place it upon notice of Robbins' interest. (Def. Ex. F; Pl. Ex. 4-c) There was nothing on the certificate of deposit given it by Vaccaro to indicate Robbins' interest (Def. Ex. B).

The Bank would not have loaned this money to Vaccaro if he had not offered some collateral (R.T. 96-97). On the strength of this collateral and without knowledge of Robbins, the Bank consummated the loan. Thus, the Bank received these funds in the ordinary course of business, without knowledge of where or how Vaccaro obtained this money, and only on the strength of this security did it enter into a new loan with Vaccaro. Accordingly to the rule established by the great weight of authority, the Bank, in cases of this kind, does not have to refund the money. *Hatch v. Fourth Natl. Bank*, 147 N.Y. 184, 41 N.E. 403 (1895); *Lake Gogebic Lumber Co. v. Burns*, 331 Mich. 315, 49 N.W.2d 310 (1951); 40 Am. Jur., *Payment*, § 204, p. 855.

SUMMARY

It is quite clear that the decision of the Ninth Circuit Court of Appeals is correct and that the petition for writ of certiorari should be denied. The facts as found by the District Court of Arizona and affirmed by the Ninth Circuit are substantiated by the evidence in this case. It is undisputed that Robbins, without first contacting the Bank in any way, sent money to Vaccaro, who, upon receipt of this money, transferred it by proper methods to the Bank.

It is further uncontradicted that the Bank, without knowledge of the existence of Robbins or the source of the funds, received the funds from Vaccaro in good faith and in the ordinary course of business, and after receipt thereof, changed its position by loaning Vaccaro an equal amount of money. It was not until one week after the termination of this transaction that the Bank had any notice or knowledge of Robbins. By then it was too late. The Supreme Court of the State of Arizona stated the rule very succinctly.

> "The rule is that money paid which might be otherwise recoverable cannot be recovered as against persons who have changed their position in good faith so that their original position cannot be restored. The blunder necessarily imposes a loss on someone, and it must be borne by the author of it." *Copper Belle Min. Co. v. Gleeson*, 14 Ariz. 548, at 556, 134 Pac. 285 (1913).

Clearly, had the Bank knowledge of Robbins' position before it made Vaccaro the loan and of the claimed restriction on the use of the Robbins funds, this whole situation would never have occurred. Robbins' failure to so much as contact the Bank in any fashion before releasing Thirty Thousand Dollars ($30,000.00) of its cus-

tomer's funds or in not notifying the Bank by telephone or wire before the transmittal of the money, makes it the author of the blunder and the loss should be borne by it.

CONCLUSION

It is submitted that the decision of the Circuit Court of Appeals for the Ninth Circuit is not in conflict with the decisions of this Court, the other circuits or the majority rule of the various states, nor does it present "clear error", and it is respectfully requested that the petition for writ of certiorari be denied.

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